

Explanatory Statement

Australian Broadcasting Corporation Act 1983

Australian Broadcasting Corporation (Definition of senior political staff member) Instrument 2014

Issued by the Authority of the Minister for Communications

Purpose

The *Australian Broadcasting Corporation (Definition of senior political staff member) Instrument 2014* (this instrument) is made by the Minister for Communications (the Minister) under subsection 3(3) of the *Australian Broadcasting Corporation Act 1983* (the ABC Act).

The purpose of this instrument is to specify classes of persons for the purpose of the definition of *senior political staff member* in subsection 3(1) of the ABC Act. The term *senior political staff member* has also relevance for the operation of relevant provisions in the *Special Broadcasting Service Act 1991* (SBS Act). A person who is a *senior political staff member* is ineligible to be appointed as a Chairperson or non-executive Director to the ABC and SBS Boards, with this restriction applying for a period of 12 months after the person ceases to be a *senior political staff member* (see subsections 12(5A) and 12(5AA) of the ABC Act, and subsections 17(2A) and 17(2AA) of the SBS Act).

This instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Background

The *National Broadcasting Legislation Amendment Act 2012* (the NBLA Act) amended the ABC Act and the SBS Act to implement a merit-based appointment process for non-executive Directors to the ABC and SBS Boards. The NBLA Act received Royal Assent on 24 July 2012 and commenced on 24 November 2012.

The merit-based appointment process is conducted by the Nomination Panel, which is established under Part IIIA of the ABC Act. The Nomination Panel plays a central role in conducting the selection process for the appointment of the ABC Chairperson and other non-executive Directors (excluding the ABC staff-elected Director) prior to the Governor-General making appointments to the ABC Board. The Nomination Panel is required to advertise vacancies and invite applications, assess all applicants for an appointment against the selection criteria determined or notified by the Minister, assess all applicants on the basis of merit, and provide a report to the Minister (or the Prime Minister and the Minister if the appointment is for the Chairperson) on the outcome of the selection process (see section 24B of the ABC Act). The Nomination Panel performs a similar role for the appointment of non-executive Directors to the SBS Board (see section 17 of the SBS Act).

Subsection 12(5A) of the ABC Act sets out the categories of people not eligible for appointment as non-executive Directors to the ABC Board, which include *senior political staff members*. Subsection 12(5AA) of the ABC Act provides that, for former *senior political staff members*, such restriction applies only for 12 months after the person ceases to be a *senior political staff member*. A similar restriction applies to appointments of non-executive Directors to the SBS Board (see subsections 17(2A) and 17(2AA) of the SBS Act).

The ABC Act defines *senior political staff member* as a person included in a class of persons specified in a legislative instrument made by the Minister under subsection 3(3) of the ABC Act (see subsection 3(1) of the ABC Act).

The purpose of this instrument is to specify two classes of persons for the purposes of the definition of *senior political staff member* in subsection 3(1) of the ABC Act, one class relating to Commonwealth *senior political staff members* (see Class A in subsection 4(1)) of the instrument) and one class relating to State or Territory *senior political staff members* (see Class B in subsection 4(2) of the instrument).

Specifically, the two classes are:

- persons employed under the *Members of Parliament (Staff) Act 1984* (Cth) and who occupy a position in the “senior staff” classification as defined by the Commonwealth Members of Parliament Staff Enterprise Agreement 2012-2015;
- persons employed in a senior position by or on behalf of a member of a State Parliament or the Legislative Assembly for the Australian Capital Territory or the Northern Territory to primarily provide advice about policy matters, the communication of policy matters to the public, and/or parliamentary matters. Persons whose positions are known by certain designations are deemed to be persons “employed in a senior position.” The instrument also provides examples of what constitutes “advice about policy matters.”

This instrument also applies to appointments of non-executive Directors to the SBS Board under the SBS Act.

Regulation Impact Statement

The Office of Best Practice Regulation has confirmed that the preparation of a Regulation Impact Statement is not necessary, as the instrument has a nil or low impact on business or the economy or individuals.

Statement of compatibility with human rights

This statement of compatibility is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

This Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the instrument

The purpose of this instrument is to specify classes of persons for the purposes of the definition of *senior political staff member* in the *Australian Broadcasting Corporation Act 1983* (ABC Act).

The term *senior political staff member* has relevance to the operation of provisions in both the ABC Act and the *Special Broadcasting Service Act 1991* (SBS Act). A person who is a *senior political staff member* is ineligible to be appointed as the Chairperson or as a non-executive Director to the ABC and SBS Boards (see subsection 12(5A) of the ABC Act and subsection 12(2A) of the SBS Act). For former *senior political staff members*, such restriction applies only for a period of 12 months after a person ceases to be a *senior political staff member*.

Human rights implications

This instrument engages the following human rights:

- the right to freedom of expression, and
- the right to take part in cultural life.

The right to freedom of expression

Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to freedom of expression. The right includes the right to seek, receive, or impart information and ideas of all kinds, and the means of their dissemination. The right extends to any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

The right is not absolute. Article 19(3) of the ICCPR provides that the exercise of the right in Article 19(2) carries with it special responsibilities and may be restricted on certain grounds, including by taking measures to ensure the protection of other citizens' right to freedom of expression.

The United Nations Human Rights Committee has recognised the important role of the media to ensure freedom of expression in any society.¹ The Committee has stated that, as a means of protecting the right of media users to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media. State parties should ensure that public broadcasting services, in particular, operate in an independent manner and they should guarantee their editorial freedom.²

The right to take part in cultural life

Article 15(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the right of everyone to take part in cultural life. The right to take part in cultural life is also recognised in Article 27(1) of the Universal Declaration of

¹ United Nations Human Rights Committee, General Comment No, 34, paragraph 13.

² United Nations Human Rights Committee, General Comment No, 34, paragraphs 14 and 16.

Human Rights.

The United Nations Committee on Economic, Social and Cultural Rights has stated that culture is a broad, inclusive concept encompassing all manifestations of human existence including, among other things, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, sport and games, methods of production or technology, natural and man-made environments, the arts, customs and traditions.³

In order for the right to be ensured, States must both refrain from interfering with the exercise of cultural practices and with access to cultural goods and services, and take positive action by ensuring preconditions for participation, facilitation and promotion of cultural life and access to and preservation of cultural goods.⁴

The Committee has also recognised that applying limitations to the right may be necessary in certain circumstances, in particular in the case of negative practices that infringe upon other human rights. However, such limitations must pursue a legitimate aim and be proportionate.⁵

Effect of the instrument on the human rights engaged

The effect of this instrument needs to be considered together with relevant provisions in the ABC and SBS Acts, which restrict the eligibility of *senior political staff members* and former *senior political staff members* to be appointed to the ABC and SBS Boards. By specifying certain classes of persons within the definition of *senior political staff member*, this instrument has the effect of restricting the appointment of persons within those classes to the ABC and SBS Boards.

In doing so, this instrument may limit these persons' right to freedom of expression and the exercise of their right to participate in cultural life through their participation on the ABC and SBS Boards. However, the limitations imposed on these persons' rights as a result of this instrument are reasonable, necessary and proportionate.

As national broadcasters, the ABC and the SBS play an important role in Australian life by providing broadcasting and digital media services of a high standard that inform, educate and entertain the Australian community. The ABC and SBS also play an important role in Australian cultural life, by contributing to Australia's cultural identity through their programs, reflecting Australia's cultural diversity, promoting its linguistic and ethnic diversity, and reflecting the changing nature of Australian society by presenting many points of view and using innovative forms of expression. Both of these roles are reflected in the Charters of both national broadcasters (see section 6 in both the ABC and SBS Acts). The ABC and SBS Boards of directors are responsible for ensuring that the ABC and SBS, respectively, perform the functions in their Charters (see section 8 of the ABC Act and section 9 of the SBS Act).

³ United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 21, paragraph 13.

⁴ United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 21, paragraph 6.

⁵ United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 21, paragraph 19.

Given their role, it is important that the ABC and SBS operate, and are seen to operate, in an independent and impartial manner.

The exclusion of *senior political staff members* from consideration for Board positions is intended to strengthen the independence and impartiality of the ABC and SBS Boards. Importantly, for former *senior political staff members*, this exclusion will only apply for a limited period of 12 months after a person ceases to be a *senior political staff member*.

Senior political staff members are often aligned, or can be perceived to be aligned, with the political party to which their member belongs and to not exclude them from the Boards would risk perceptions of political bias and potentially compromise the perception in the minds of the public of the independence or impartiality of the national broadcasters. Political allegiance could also potentially influence content production in favour of a particular political view or political party.

This instrument (together with relevant provisions in the ABC and SBS Acts) will assist in reducing the potential for actual or perceived political favouritism or bias and reinforce the independence and impartiality of the national broadcasters. In so doing, it will also protect the rights of members of the broader community, as audiences of the ABC and SBS, to freedom of expression and to take part in cultural life.

Conclusion

The instrument is compatible with human rights, because the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

Consultation

The Minister consulted with the ABC, the SBS, the Nomination Panel, the federal and state branches of the Liberal Party, the National Party and the Australian Labor Party on a draft instrument as all are directly impacted by this instrument.

Notes on the *Australian Broadcasting Corporation (Definition of senior political staff member) Instrument 2014*

Section 1 provides that the name of the instrument is the *Australian Broadcasting Corporation (Definition of senior political staff member) Instrument 2014*.

Section 2 provides that the instrument will commence on the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 sets out key definitions for the purposes of the determination.

Section 4 sets out two classes of persons specified for the purposes of the definition of *senior political staff member* in subsection 3(1) of the ABC Act.

Subsection 4.1 relates to Commonwealth *senior political staff members* (Class A). The class includes persons employed under the *Members of Parliament (Staff) Act*

1984 (Cth) and who occupy a position in the “senior staff” classification as defined by the Commonwealth Members of Parliament Staff Enterprise Agreement 2012-2015 made under the *Fair Work Act 2009*. This would include persons occupying positions with the classification of Principal Adviser, Senior Adviser, Chief of Staff and Senior Media Adviser.

Subsection 4.2 relates to State or Territory *senior political staff members* (Class B). This class includes persons employed in a senior position by or on behalf of a member of a State Parliament or the Legislative Assembly for the Australian Capital Territory or of the Northern Territory to primarily provide advice about policy matters, the communication of policy matters to the public, and/or parliamentary matters (see paragraph 4.2(a)).

In addition, persons whose positions are known by certain designations are deemed to be persons “employed in a senior position” for the purposes of this class (see paragraph 4.2(b)). These include Chief of Staff, Deputy Chief of Staff, Principal Adviser (however described), Senior Adviser (however described), Senior Media Adviser (however described) and Specialist Adviser (however described).

This deeming provision is not intended to limit the operation of paragraph 4.2(a) of the instrument. Rather, it is intended to capture the various classifications for senior advisers across different States and Territories. For example, in Western Australia there is currently a position designated as “Principal Policy Adviser” while in Queensland there is a position designated as “Principal Media Adviser.” The reference to Principal Adviser (however described) in paragraph 4.2(b) of the instrument is intended to capture both these (and other similar) positions.

Paragraph 4.2(c) provides examples of what constitutes “advice about policy matters” for the purpose of subsection 4.2. These include:

- developing policy proposals for the consideration of the member;
- analysing policy proposals and making recommendations to the member;
- participating in policy discussions with or on behalf of the member;
- where the member is a Minister, working with public sector employees to implement policies.